



NATIONAL CONGRESS OF AMERICAN INDIANS

February 16, 2021

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Via email: regs.comments@federalreserve.gov

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NCAI HEADQUARTERS

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Re: NCAI Comments in Response to the Advance Notice of Proposed Rulemaking, *Modernization of Community Reinvestment Act Regulations*, Docket No: R-1723 (12 CFR 228, RIN 7100-AF94)

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization composed of American Indian and Alaska Native Tribal Nations and their citizens, I write to express NCAI's formal support of the Advance Notice of Proposed Rulemaking (ANPR), Docket No. R-1723, which would modernize the regulations governing the Community Reinvestment Act (CRA).

I. Indian Country's Lending Needs

NCAI and its organizational partners worked closely with the Office of the Comptroller of Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve Board during the rulemaking process to share Indian Country's unified priorities for how the modernized CRA regulations should comprehensively incentivize increased access to capital and credit for tribal governments and communities.

The CRA was signed into law in 1977 to encourage depository institutions to help serve the credit needs of the communities in which they operate, in particular low- and moderate-income (LMI) areas and populations. The CRA also sought to deter discriminatory credit and lending practices against those populations, a practice commonly known as "redlining." With many tribal lands located in the poorest regions of the country, and with over 45 percent of the American Indian and Alaska Native (AI/AN) population in LMI communities,¹ on paper the CRA should have discernably enhanced the ability of AI/AN to access capital and credit through CRA-qualifying financial institutions.

¹ Bureau of Indian Affairs (BIA). 2013 American Indian Population and Labor Force Report. <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf>.

However, the implementation of the CRA often excludes AI/ANs living on tribal lands.² Indian Country is geographically diverse and includes many tribal lands in urban areas in addition to rural and remote areas. Rural and remote LMI communities

face different issues from LMI communities in urban areas. While the CRA takes into account the differences between urban and rural areas, the current CRA regulations do not address the unique needs of tribal governments and communities which are chronically underbanked and are often located on lands subject to jurisdictional complexities. For these reasons, the CRA is less successful in Indian Country than in other LMI communities. We believe the proposed regulations will help address these shortcomings.

In 2018, the U.S. Commission on Civil Rights documented the dire need in Indian Country with its *Broken Promises Report*, which found that:

Federal programs designed to support the social and economic well-being of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities.³

The current coronavirus 19 (COVID 19) pandemic has further exposed critical needs in Indian Country, such as increased investments for infrastructure, housing, education, healthcare and broadband. Despite this need and recognition, tribal nations encounter difficulty accessing credit through lending institutions which currently have very little incentive to extend credit and capital services onto tribal lands. Lack of access to capital particularly impacts tribal governments because of infringement on their taxing authority. Though the Supreme Court has recognized tribal authority to tax⁴, taxation of economic activities on Tribal lands is often subject to attempts by state and local governments to tax the same activity, resulting in complex, confusing, and unpredictable rules. This dual taxation creates disincentives to invest in businesses on tribal lands and results in Tribal Nations often foregoing their inherent right to tax in order to retain private investment on their lands. This also leads Tribal Nations to rely more heavily on tribal enterprises than their state and local counterparts, which in turn requires increased access to credit services to support these enterprises.

In addition to the needs of tribal enterprises, AI/ANs on tribal lands or in remote areas face some of the highest rates of unemployment and poverty and often lack access to credit services which would provide for both individual and community financial development.⁵ In 2014, the FDIC estimated that 16.9 percent of AI/AN households were unbanked, compared to only 7.7 percent of the general population⁶ This is result of significant barriers to credit options, which is due in part to the jurisdictional complexity of lending on tribal lands. A 2016 Native Nations Institute study found that Indian Country faces “high interest rates on loans, the inability to use trust land as collateral on loans, and a general unwillingness on the part of financial institutions to lend to reservation-based

² Native CDFI Network “Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment,” May 17, 2013.

³ Broken Promises: Continued Federal Funding Shortfall for Native Americans (Broken Promises), U.S. Commission on Civil Rights, (December 20, 2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>

⁴ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

⁵ U.S. Census Bureau; (2017). Table B17001C and B17001: Poverty Status in the Past 12 Months by Sex by Age, 2013-2017 American Community Survey 5-Year Estimates

⁶ Federal Deposit Insurance Corporation (FDIC). 2013 Federal Deposit Insurance Corporation National Survey of Unbanked and Underbanked Households. Washington, DC: FDIC, October 2014.

applicants.”⁷ Meanwhile, banks can fulfill CRA requirements without having to serve AI/AN communities, leaving lending institutions with little to no incentive to invest in Indian Country. In order for the CRA to meet its mission in Indian Country, the CRA must prioritize increased incentives for investment in Indian Country and increased education about Indian Country for all parties.

II. The ANPR’s Proposed Changes

The COVID-19 pandemic has left many tribal enterprises and small businesses shuttered, and while federal legislation has offered temporary stimulus, the recovery period will be long and arduous without increased access to capital.

The Federal Reserve’s ANPR includes tribal access priorities through:

- specific measures aimed at spurring investments in tribal public safety, housing, education, healthcare, and communications infrastructure, as well as other community and economic development projects on tribal lands;
- providing banks with CRA credit for serving tribal communities even when Indian Country falls outside their CRA assessment areas; and
- creating CRA scoring incentives for banks that choose to do business in Indian Country.

NCAI supports the ANPR, but encourages the Federal Reserve to increase incentives for financial institutions to lend in Indian Country, minimize incentives for activities which do not result in positive impacts to Indian Country, and increase education efforts.

Education on lending in Indian Country is particularly needed to assist regulators and lenders and tribal governments, enterprises, and small businesses seeking to access capital. This educational effort is multifaceted and should entail a curriculum for regulators and lenders that provides an overview of lending in Indian Country with an emphasis on the CRA and opportunities for implementation on tribal lands. Additionally, CRA regulators should participate and facilitate ongoing meetings in roundtables, summits, and through other venues between regulators and lenders and tribal governments, enterprises, small businesses, and Native Community Development Financial Institutions (NCDFIs) to address the diversity of needs within Indian Country. Lack of education about the opportunities and benefits of investments in tribal communities is an entrenched barrier to economic development, and the Federal Reserve and CRA regulators can play a critical role in convening lenders and the tribal service community to build community-based partnerships to achieve the CRA’s mission with enhanced incentives.

In addition to education, NCAI also supports regulatory efforts to increase lending activities in Indian Country. As recognized by Governor Lael Brainard in her remarks at NCAI’s 77th Annual Convention, the majority of AI/AN counties have an average of 3 bank branches, compared to an average of 9 in other rural counties and an average of 26 nationally.⁸ As the CRA largely defines a bank’s assessment area(s) by the location of bank branches, this leaves much of Indian Country outside of the CRA’s regulations which cover assessment areas in order to account for community

⁷Access to Capital and Credit in Native Communities, Miriam Jorgensen, University of Arizona, Native Nations Institute, 2016 - <http://nni.arizona.edu/publications-resources/publications/papers/2016/access-capital-and-creditnative-communities>

⁸ Board of Governors of the Federal Reserve, Lael Brainard. Modernizing and Strengthening CRA Regulations: A Conversation with the National Congress of American Indians, November 10, 2020. <https://www.bis.org/review/r201111b.pdf> (via webcast).

defined inequalities. The ANPR would consider Indian Country in reviews of bank retail activities, regardless of a bank's assessment areas. NCAI supports this proposed change to address the assessment area issues that inhibit banks from lending in Indian Country. NCAI also supports regulatory changes that incentive lending activity in Indian Country such as through the use of multipliers for CRA credits. As an example, the OCC's proposed rule offered multipliers to "CRA deserts" which have fewer bank branches and less community financing. Tribal lands often fall within this definition and would benefit from a similar approach.

Additionally, the ANPR asked two main questions regarding the proposed changes to the CRA in Indian Country:

1. Should CRA consideration be given for retail lending activities conducted within Indian Country regardless of whether those activities are located in the bank's assessment area(s)?
2. Should all retail lending activities in Indian Country be eligible for consideration in the Retail Lending Subtest or should there be limitations or exclusions for certain retail activities?

In general, we support CRA consideration of retail lending activities in Indian Country as outlined above, but caution that the regulators should review the types of eligible activities so that lenders do not just check the box with increasing access to only one type of retail lending. Currently, the list of retail lending activities which are currently eligible for consideration for the Retail Lending Subtest include activities which largely are limited to the extension of consumer credit such as credit cards. While we support increased access to consumer credit for tribal communities, we request that Federal Reserve not permit such activities to substitute for broad access to the full suite of retail lending available to non AI/AN LMI communities. Additionally, retail lending is one aspect of CRA investment needed in Indian Country and we ask Federal Reserve to particularly ensure that credit for capital building is directed toward Indian Country as well, including for Tribal Nations, enterprises, small businesses, and NCDFIs.

III. Refining the Proposed Regulations to Further Strengthen the CRA for Indian Country

In closing, NCAI continues to support the Federal Reserve Board's work to modernize the CRA and NCAI supports the proposed ANPR with the above regulatory and educational additions discussed above. We look forward to working with the Federal Reserve and regulators to increase CRA credit for activities in Indian Country. Such efforts would help better effectuate the statute's public-private partnership and aid the socio-economic development of underserved tribal communities through credit investment.

Sincerely,



Derrick Beetso
General Counsel